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No. 301

# In the Supreme Court of the United States

October Term, 1937

GUARANTY TRUST COMPANY OF NEW YORK, Executor, etc., Petitioner,

vs.

JOHN T. SULLIVAN, Commissioner of Internal Revenue.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

PETITION FOR CERTIORARI.

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# In the Supreme Court of the United States

OCTOBER TERM, 1937

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No. 301

GUARANTY TRUST COMPANY OF NEW YORK, EXECUTOR, ESTATE OF LAMAR L. FLEMING, PETITIONER

*v.*

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE

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*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT*

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## BRIEF FOR THE RESPONDENT IN OPPOSITION

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### OPINIONS BELOW

The opinion of the United States Board of Tax Appeals (R. 62) is reported in 34 B. T. A. 384. The opinion of the Circuit Court of Appeals (R. 95) is reported in 89 F. (2d) 692.

### JURISDICTION

The judgment of the Circuit Court of Appeals was entered on May 10, 1937. (R. 98.) Petition for certiorari was filed August 10, 1937. The juris-

diction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

## QUESTION PRESENTED

Whether the return of decedent's income for the period from January 1 to December 16, 1933, date of death, should include decedent's share of partnership profits from the end of the partnership fiscal period, July 31, 1933, to date of death, as well as his share of partnership profits for the period ended July 31, 1933.

## STATUTES AND REGULATIONS INVOLVED

The statutes and regulations involved are set forth in the Appendix, *infra,* pp. 11–14.

## STATEMENT

Lamar L. Fleming, a member of the partnership of Anderson, Clayton and Fleming, cotton brokers, died December 16, 1933. The firm operated under a partnership agreement, dated August 1, 1930, which expired on July 31, 1933. The agreement provided for the operation of the partnership on a cash receipts and disbursements basis, with the fiscal year ending July 31st of each year. The decedent was also on the cash receipts and disbursements basis, but kept his accounts and made his tax returns on the calendar year basis. (R. 64, 19.)

On August 1, 1933, a new partner was admitted to the firm, and a new partnership agreement was made, which was identical with the previous one, except as to the division of the profits. This agreement provided that the partnership's fiscal year should begin August 1, 1933, and end July 31, 1934. (R. 64.)

After July 31, 1933, decedent was notified of his share of the partnership's profits for the fiscal year ended July 31, 1933. A large portion of his share was allowed to remain to his credit with the partnership. No part of the partnership profits for the period between the end of the partnership's fiscal year, July 31, 1933, and the date of decedent's death, was paid to or received by the decedent. The partnership agreements provided for but one yearly accounting and settlement, which was at the end of the fiscal year. (R. 64–65.)

After decedent's death the business was continued under the same name by the surviving partners, until early in May, 1934, when a new partnership agreement was entered into, taking over the business as of December 18, 1933, and providing for a fiscal year ended July 31, 1934, and from year to year thereafter. (R. 65.)

Shortly after the death of the decedent, an account was taken, covering the period from August 1 to December 16, 1933, and on or about January 9, 1934, decedent's executors received a partial distribution of the profits. In the month of Febru-

ary, 1934, the executors of decedent received a final distribution. (R. 65.)

The executors of the estate filed an estate tax return for the decedent, which included, besides other items, decedent's share of the profits earned during the period, August 1 to December 16, 1933, and paid an estate tax thereon. (R. 66.)

On February 28, 1934, the survivors of the partnership filed a return for it in liquidation for the fiscal year beginning August 1, 1933, and ending December 16, 1933, and thereafter filed a return for the fiscal year, December 17, 1933, to July 31, 1934. Both returns were filed without permission or direction of the respondent. (R. 66.)

Decedent's executors filed his income tax return for the period, January 1 to December 16, 1933, date of his death, and included the decedent's distributive share of the profits of the partnership for the fiscal year ended July 31, 1933, but did not include therein his share of the profits of the partnership earned between July 31, 1933, the end of its fiscal year, and the date of decedent's death, December 16, 1933. (R. 65–66.)

In determining the deficiency, the Commissioner included in decedent's income, partnership profits for the period between July 31, 1933, and the date of decedent's death. (R. 66.) The Board of Tax Appeals held that the inclusion in decedent's income of partnership profits for a period greater than twelve months violated the tenet that income

tax is assessed on the basis of a twelve-month period. (R. 71.) The Circuit Court of Appeals reversed, holding that while the determination included partnership income for more than twelve months, it covered decedent's, the taxpayer's, income for a period of less than twelve months. (R. 97–98.)

## ARGUMENT

Petitioner contends for a construction of the Revenue Act of 1932 which would permit a deceased partner's share of partnership profits to escape income taxes for periods up to just less than a year. For, had the partnership fiscal period ended January 1st, 1933, and had decedent died December 30th, 1933, upon petitioner's theory no part of partnership profits between those dates would have been includable in decedent's income. As income to date of death becomes principal in the hands of the legal representatives, the legal representative pays no income tax thereon. *Bull* v. *United States,* 295 U. S. 247. It seems most unlikely that Congress intended such income to escape taxation. Cf. *Irwin* v. *Gavit,* 268 U. S. 161, 166.

As pointed out by the Circuit Court of Appeals (R. 96), the question turns on whether or not the death of Mr. Fleming within his taxable year brought about the ending of what is called in the statute (Section 182 (a) of the Revenue Act of 1932, *infra,* p. 12) a "taxable year of the partnership."

The phrase should be considered in connection with Section 42 of the Revenue Act of 1932, *infra*, p. 11, which provides that items of income shall include income for the taxable year in which received, unless properly accounted for as of a different period. In the Revenue Act of 1934, the corresponding section (Sec. 42, *infra*, p. 12) was amended by adding the following:

> In the case of the death of a taxpayer there shall be included in computing net income for the taxable period in which falls the date of his death, amounts accrued up to the date of his death if not otherwise properly includible in respect of such period or a prior period.

It seems clear that the amendment was clarifying in purpose and declaratory of the existing law. Cf. *Helvering* v. *Twin Bell Syndicate*, 293 U. S. 312, 322. And this, alone, establishes the correctness of the lower court's decision. At any event, it discloses the relative unimportance of the question involved.

Furthermore, Section 182 (a) taxes to each partner whose taxable year is different from that of the partnership, his share of partnership income for "any taxable year", ending within his taxable year, whether distributed or not. In New York, the death of a partner causes a dissolution of the partnership. Secs. 60, 62, New York Partnership Act, *infra; Cahill* v. *Haff*, 248 N. Y. 377; *Stewart* v. *Robinson*, 115 N. Y. 328. The survivors became

trustees for the purpose of effecting liquidation and distributing decedent's share of the profits up to the date of his death. *Leonard* v. *Leonard,* 201 N. Y. S. 113; *Wolbach* v. *Commissioner,* 268 Mass. 365. As of date of decedent's death, an accounting was had, and a new partnership was formed. The partnership filed its (information) return for the period ended with his death. All that remained was to ascertain, from facts known at the date of decedent's death, the share due him. In contemplation of law, his share of the profits became distributable, and were a part of his income for the period for which his return was filed. *Darcy* v. *Commissioner,* 66 F. (2d) 581 (C. C. A. 2d), certiorari denied, 290 U. S. 705. The statute specifically provides that whether or not they were actually distributed during the period is immaterial.

It would seem settled by the decision of this Court in *Bull* v. *United States,* 295 U. S. 247, that a deceased partner's share of profits earned prior to his death is income taxable to him. This Court there held (pp. 254–255):

> We concur in the view of the Court of Claims that the amount received from the partnership as profits earned prior to Bull's death was income earned by him in his lifetime and taxable to him as such; * * *.
>
> * * * * * *
>
> * * * The decedent's share of profits accrued to the date of his death was $24,124.20. This was income to him in his life-

> time and his executor was bound to return it as such.

As the court below points out, a partnership pays no tax. Its return is purely for information. Its "taxable year" is, in reality, an accounting period. There is no reason why the accounting period cannot be for less than twelve months. Section 48 (a) of the Revenue Act of 1932, *infra*, specifically provides that "taxable year" includes fractional parts of a year for which a return is filed. It has been held in many cases that "taxable year" may include periods of less than one year. *Wolverine Petroleum Corp.* v. *Commissioner*, 75 F. (2d) 593 (C. C. A. 8th), certiorari denied, 295 U. S. 743; *Wright & Kremers* v. *United States*, 3 F. Supp. 616 (C. Cls.); *Pennsylvania Chocolate Co.* v. *Lewellyn*, 27 F. (2d) 762, 763 (W. D. Pa.); *Carroll Chain Co.* v. *Commissioner*, 1 B. T. A. 38, approved, 8 F. (2d) 529 (S. D. Ohio); *Patapsco Ballast Co.* v. *Commissioner*, 1 B. T. A. 1081; *Lynch Construction Co.* v. *Commissioner*, 3 B. T. A. 313; *Purity Oats Co.* v. *Commissioner*, 4 B. T. A. 585; *Durabilt Steel Locker Co.* v. *Commissioner*, 5 B. T. A. 239; *Bruner Woolen Co.* v. *Commissioner*, 6 B. T. A. 881.

Petitioner contends that respondent's determination includes decedent's income for a period greater than twelve months. This seems fully answered by the court below (R. 97):

> Of course this made two "partnership taxable years" end in one taxable year of the

> decedent. Yet that did not make his taxable year include his income for more than twelve months. It did, indeed, include his share of partnership income for more than a twelve-month period, but that is immaterial since the partnership is not the taxpayer. *The period for which the decedent's income is taxed is a little less than twelve months and the income on which he is taxed is only that distributable to him as of that period.* [Italics supplied.]

See also *Shonnard* v. *Price,* 49 F. (2d) 794 (E. D. N. Y.); *Jones* v. *Commissioner,* 12 B. T. A. 471.

*Helvering* v. *Morgan's, Inc.,* 293 U. S. 121, cited by petitioner, involved a question totally unrelated to the question here. There, a corporation joined an affiliated group and was required to file two returns in 1925. The question was whether the two separate periods in 1925 constituted two "taxable years" within the meaning of Section 206 of the Revenue Act of 1926, which permits a taxpayer suffering a net loss in any taxable year to deduct it from taxable gains in the two succeeding taxable years.

*Burnet* v. *Sanford & Brooks Co.,* 282 U. S. 359, also cited by petitioner, involved the attempt of a taxpayer to deduct losses in a prior year from receipts in a subsequent year from the same transaction.

*Bankers' Trust Co.* v. *Bowers,* 295 Fed. 89 (C. C. A. 2d), decided by the court below, involved

Section 226 of the Revenue Act of 1921, which provided that where, with the approval of the Commissioner, a taxpayer changed his basis of computing net income from fiscal year to calendar year or calendar year to fiscal year, separate returns must be filed; and that in the case of a return for less than one year, the income should be placed on an annual basis by multiplying the amount thereof by twelve and dividing the result by the number of months included in the period. The question presented was whether the section was applicable to returns filed for a decedent, and to returns covering income received by estates of decedents. The decision rested purely upon the construction of the section—the interrelation of its subsections.

### CONCLUSION

The decision below is correct. It is not in conflict with decisions of other courts. It conforms to principles announced by this Court. The petition should be denied.

Respectfully submitted.

STANLEY REED,
*Solicitor General.*
JAMES W. MORRIS,
*Assistant Attorney General.*
SEWALL KEY,
A. F. PRESCOTT,
*Special Assistants to the Attorney General.*

SEPTEMBER, 1937.

## APPENDIX

Revenue Act of 1932, c. 209, 47 Stat. 169, 185, 187, 222:

SEC. 41. GENERAL RULE.

The net income shall be computed upon the basis of the taxpayer's annual accounting period (fiscal year or calendar year, as the case may be) in accordance with the method of accounting regularly employed in keeping the books of such taxpayer; but if no such method of accounting has been so employed, or if the method employed does not clearly reflect the income, the computation shall be made in accordance with such method as in the opinion of the Commissioner does clearly reflect the income. If the taxpayer's annual accounting period is other than a fiscal year as defined in section 48 or if the taxpayer has no annual accounting period or does not keep books, the net income shall be computed on the basis of the calendar year. * * *

SEC. 42. PERIOD IN WHICH ITEMS OF GROSS INCOME INCLUDED.

The amount of all items of gross income shall be included in the gross income for the taxable year in which received by the taxpayer, unless, under methods of accounting permitted under section 41, any such amounts are to be properly accounted for as of a different period.

SEC. 48. DEFINITIONS.

When used in this title—

(a) TAXABLE YEAR.—"Taxable year" means the calendar year, or the fiscal year ending during such calendar year, upon the

basis of which the net income is computed under this Part. "Taxable year" includes, in the case of a return made for a fractional part of a year under the provisions of this title or under regulations prescribed by the Commissioner with the approval of the Secretary, the period for which such return is made. The first taxable year, to be called the taxable year 1932, shall be the calendar year 1932 or any fiscal year ending during the calendar year 1932.

SEC. 181. PARTNERSHIP NOT TAXABLE.

Individuals carrying on business in partnership shall be liable for income tax only in their individual capacity.

SEC. 182. TAX OF PARTNERS.

(a) GENERAL RULE.—There shall be included in computing the net income of each partner his distributive share, whether distributed or not, of the net income of the partnership for the taxable year. If the taxable year of a partner is different from that of the partnership, the amount so included shall be based upon the income of the partnership for any taxable year of the partnership ending within his taxable year.

Revenue Act of 1934, c. 277, 48 Stat. 680, 694:

SEC. 42. PERIOD IN WHICH ITEMS OF GROSS INCOME INCLUDED.

The amount of all items of gross income shall be included in the gross income for the taxable year in which received by the taxpayer, unless, under methods of accounting permitted under section 41, any such amounts are to be properly accounted for as of a different period. In the case of the death of a taxpayer there shall be included in computing net income for the taxable

period in which falls the date of his death, amounts accrued up to the date of his death if not otherwise properly includible in respect of such period or a prior period.

New York Partnership Act, Laws of 1919, c. 408:

SEC. 60. *Dissolution defined.*—The dissolution of a partnership is the change in the relation of the partners caused by any partner ceasing to be associated in the carrying on as distinguished from the winding up of the business.

SEC. 61. *Partnership not terminated by dissolution.*—On dissolution the partnership is not terminated, but continues until the winding up of partnership affairs is completed.

SEC. 62. *Causes of dissolution.*—Dissolution is caused:

* * * * *

4. By the death of any partner;

* * * * *

Treasury Regulations 77, promulgated under the Revenue Act of 1932:

ART. 901. *Partnerships.*—Partnerships as such are not subject to taxation under the Act, but are required to make returns of income. (See section 189 and articles 941 and 942.) Individuals carrying on business in partnership are, however, taxable upon their distributive shares of the net income of such partnership, whether distributed or not, and are required to include such distributive shares in their returns. The net income of the partnership shall be computed in the same manner and on the same basis as the net income of an individual, except that the deduction of contributions or gifts is not permitted, * * *.

ART. 902. *Distributive shares of partners.*—The distributive share of the net income of the partnership which a partner is required to include in his return is his proportionate share of the net income of the partnership, either—

(*a*) For the taxable year upon the basis of which the partner's net income is computed, or

(*b*) If the partner's net income is computed upon the basis of a taxable year different from that upon the basis of which the net income of the partnership is computed, for the taxable year of the partnership ending within the taxable year upon the basis of which the partner's net income is computed.

U. S. GOVERNMENT PRINTING OFFICE: 1937